STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

CENTRAL ILLINOIS LIGHT COMPANY d/b/a AmerenCILCO	)	
	)	No. 05-0160
Proposal to implement a competitive procurement process by establishing Rider BGS, Rider BGS-L, Rider RTP, Rider RTP-L, Rider D and Rider MV	)	
CENTRAL ILLINOIS PUBLIC SERVICE COMPANY d/b/a AmerenCIPS	)	
	)	No. 05-0161
Proposal to implement a competitive procurement process by establishing Rider BGS, Rider BGS-L, Rider RTP, Rider RTP-L, Rider D and Rider MV	)	
ILLINOIS POWER COMPANY d/b/a AmerenIP	)	
	)	No. 05-0162
Proposal to implement a competitive procurement process by establishing Rider BGS, Rider BGS-L, Rider RTP, Rider RTP-L, Rider D and Rider MV	)	

REPLY TO BRIEFS ON EXCEPTIONS

BY THE PEOPLE OF THE STATE OF ILLINOIS

Susan Hedman
Susan L. Satter
Public Utilities Bureau
Attorney General's Office
100 West Randolph Street
Chicago, Illinois 60601
Telephone: (312) 814-1104/4947
Fax: (312) 814-3212
shedman@atg.state.il.us
ssatter@atg.state.il.us

December 30, 2005

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REPLY TO BRIEFS ON EXCEPTIONS

BY THE PEOPLE OF THE STATE OF ILLINOIS

The People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois, file this Reply to Briefs on Exceptions, pursuant to Section 200.830 of the Commission's Rules of Practice, 83 Ill. Admin. Code § 200.830, in response to the Briefs on Exceptions filed by the Ameren Companies ("Ameren") and the Staff of the Illinois Commerce Commission ("Staff") on December 23, 2005, in the above-captioned docket. The People respectfully request that the Commission reject the exceptions and revised language proposed by Ameren and Staff that are

discussed herein and, instead, adopt the exceptions to the Proposed Order filed in this Reply and in the People's Exceptions and Brief on Exceptions.

I. SUMMARY OF POSITION

Throughout this proceeding, the Attorney General has lamented the failure of retail competition to develop in Illinois in the manner anticipated when the Public Utilities Act ("PUA") was amended in 1997[1] and vigorously defended the rights of captive customers – who are entitled to the continued protections afforded by the regulatory safeguards specified in the PUA, until the advent of retail competition. Our Reply to Briefs on Exceptions urges the Commission to reject Ameren's suggested revisions to the Proposed Order relating to Supply Procurement Adjustments, prudence review, federal and state jurisdiction, and the transfer of Ameren's generating plants to an unregulated affiliate. This Reply also requests that the Commission revise the Proposed Order to clarify that Ameren's tariff filing plainly states that it is a submission pursuant to Article IX of the PUA. Finally, we ask that the Commission reject Staff's suggested revisions to the Proposed Order relating to the section of Article IX that governs purchased power riders and Staff's suggestion that contingency purchases should be presumed prudent.

[1] The 1997 Amendments express confidence that competition can lead to lower prices and recognize that regulation is necessary to protect consumers in the absence of competition. Specifically, the General Assembly found:

> A competitive wholesale and retail market must benefit all Illinois citizens. The Illinois Commerce Commission should act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers. Consumer protections must be in place to ensure that all customers continue to receive safe, reliable, affordable, and environmentally safe electric service.

220 ILCD 5/16-101A(d).

II. REPLY TO AMEREN

Ameren's December 23, 2005 Brief contains ten exceptions to the Proposed Order. In this Reply, the People respond to three Ameren exceptions:

Exception No. 4 Supply Procurement Adjustment

Exception No. 9 Prudence Review and State/Federal Jurisdiction

Exception No. 10 Generation Transfer

A. Ameren's Proposal to Collect Supply Procurement Adjustments through a Variable Charge was Properly Rejected in the Proposed Order. (Ameren Exception No. 4)

In Ameren Exception No. 4, Ameren argues that the Commission should allow recovery of certain supply procurement costs on a per kilowatthour basis that varies as demand varies. (Ameren BOE at 11-15.) The Proposed Order properly denies variable recovery of these costs. (PO at 218.) Supply procurement costs are ordinary expenses that a utility offering bundled service must incur. (See 220 ILCS 5/16-103.) As such, they should be managed as other utility expenses are managed, and recovered as other expenses are recovered. The special treatment Ameren requests is both extraordinary and unnecessary. The Proposed Order properly concludes that recovery of these costs is more appropriately addressed in a delivery services case. Ameren' Exception No. 4 and the language proposed in connection with this Exception should be rejected.

B. The Commission Should Reject Ameren's Attempt to Eliminate the Findings in the Proposed Order relating to the Need for an Annual Prudence Review and Federal/State Jurisdiction. (Exception No. 9)

Ameren's Exception No. 9 seeks to eliminate Sections III.E.3 and 4 from the Proposed Order. (Ameren BOE at 22.) Section III.E.3 contains a "prudency analysis" which supports the finding that "power purchases made pursuant to the auction should be subject to an annual reconciliation proceeding to determine prudency as outlined in [PUA] Section 9-220." (PO at 76 – 78.) Section III.E.4 covers issues related to "State and Federal Authority" and "Federal Pre-emption." (PO at 78 -80.)

Ameren proposes to insert the following language into the Proposed Order to replace Sections III.E.3 and 4:

> The overwhelming record in this case provides more than enough evidence for the Commission to determine the prudence of the Ameren Companies' proposed competitive auction procurement process. Having reviewed this record, the Commission concludes that such process is prudent. As discussed in other parts of this Order, the Commission finds that it has the authority to reach this conclusion, and therefore again rejects the legal arguments offered by the Attorney General and CUB.

(Ameren BOE at 22.) As discussed in more detail below, the Commission should deny Ameren's requests to eliminate Sections III.E.3 and 4 from the Proposed Order and should reject Ameren's substitute language – which is not supported by the record in this consolidated proceeding and is contrary to PUA Section 9-220.

1. Ameren's Suggested Revisions to the Prudence Review Language in the Proposed Order should be Rejected

Ameren concedes that "the Commission has the power to review the prudence of their power procurement activities" and that "the Commission should assess the prudence of power procurement." (Ameren BOE at 19.) However,

Ameren incorrectly asserts that the Commission can discharge its duty to determine whether costs have been prudently incurred by simply finding, in the instant proceeding, that "the auction itself is a prudent means of acquiring power." (Ameren BOE at 12 – 20.) That's plainly wrong. PUA Section 9-220 and the Proposed Order make clear that the ICC must review the *actual* costs incurred by a utility to purchase power (whether through an auction or another method of procurement) and may authorize recovery only for costs that were prudently incurred. (PO at 76-78 and 220 ILCS 9-220(a).)

a. The PUA requires annual prudence reviews of power purchases

The Proposed Order shows that PUA Section 9-220 requires the Commission to hold annual public hearings "to review whether the purchased power costs being passed through to ratepayers were 'prudent.'" (PO at 77, citing 220 ILCS 9-220) The Proposed Order also specifically finds that "[w]hile the instant proceeding and the Commission review during the three-day post-auction window are important tools in terms of prudency, they do not constitute annual public hearings within the meaning of 9-220." (PO at 78.) Ameren's assertions to the contrary are, therefore, demonstrably wrong. The Commission should deny Ameren's request to strike the findings in the Proposed Order requiring an annual prudence review and reject Ameren's proposed language, which suggests that the instant proceeding obviates the need for any future prudence reviews. (Ameren BOE at 17 - 22.)

b. Annual prudence reviews are required for all power purchases, regardless of the degree of discretion involved.

Ameren asserts that "no after-the-fact prudence review is necessary" because "there would be no discretionary action by the utility for the Commission to review after the auction process is competed and contracts are executed." (Ameren BOE, at 20 and 21.) However, as the Proposed Order points out, "there is no language in Section 9-220 exempting 'no discretion' purchases from the annual reconciliation process." (PO at 78.) If Ameren seeks such an exemption to Section 9-220, the proper forum in which to raise that issue is the General Assembly – not this proceeding.

Unless the PUA is amended, prudence reviews will be required for all power purchases to assess "management planning and decision-making" by utilities. *Business and Prof. People for the Pub. Interest v. Illinois Commerce Comm'n, 279 Ill.App.3d 824, 831, 665 N.E.2d 553, 558 (1st Dist. 1996).* The prudent management standard will continue to apply "not only to the actual purchase amounts but to the reasons for those purchases," based on what the utility knew or should have known. *United Cities v. Illinois Commerce Commission, 163 Ill.2d 1, 643 N.E.2d 719, 728 (1994),* citing with approval, *Business and Professional People for the Public Interest v. Illinois Commerce Commission, 171 Ill. App.3d 948, 525 N.E.2d 1053 (1988) ("1988 BPI case").*

Contrary to Ameren's assertions, the instant case and a three-day post-auction review are *not,* by themselves, sufficient to ensure that consumers pay only those costs that are prudently incurred. (Ameren BOE at 20.) Unless utilities continue to be held accountable through prudency reviews, they will have no

incentive to make plans or decisions that minimize risks and costs to consumers. A *post hoc* review to investigate management decisions and to determine whether costs were prudently incurred is necessary to protect the right of the public to "pay no more than the reasonable value of utility services. " *Citizens Utility Board v. ICC, 276 Ill. App.3d 730, 736-737, 658 N.E.2d 1194, 1200 (1st Dist. 1995).*

In the absence of a prudence review, there would be no incentive for Ameren or Ameren's suppliers to minimize cost or price -- because they could assume that ratepayers would cover 100 percent of *whatever* price Ameren and the suppliers charged for electricity. In contrast, a prudence review would provide an appropriate incentive for Ameren and Ameren's suppliers to minimize their costs and prices to increase the likelihood that they will be found prudent and to increase the likelihood of 100 percent recovery. If a declining-clock uniform-price auction actually ensures that Ameren pays the lowest possible market price for electricity, as Ameren claims, then neither Ameren nor suppliers planning to bid should be concerned about a prudence review.

c. The Commission Should Clarify the Proposed Order to Make Clear that the Proposed Tariff was Filed Pursuant to Article IX of the PUA.

Ameren could have and should have provided language to clarify the discussion of Section 9-220 where the Proposed Order states: "Since the instant proceeding was not filed pursuant to Section 9-220 . . ." (PO at 78.) Ameren should have pointed out that, the original tariff filing contradicts this statement. Indeed, the "Supplemental Statement" filed in connection with Ameren's proposed tariffs states that they were "filed pursuant to Article IX, just as envisioned by the

statute." *Supplemental Statement, ICC docket nos. 05-0160, 05-0161, 05-0162 (February 28, 2005) p. 6.*

In light of Ameren's clear statement that the tariff was filed pursuant to Article IX of the PUA (which, of course, includes Section 9-220), the Proposed Order should be amended at page 78 as follows:

> Since the instant proceeding was ~~not~~ filed pursuant to Article IX of the Public Utilities Act, ~~Section 9-220 and Ameren presently has no fuel adjustment clause in effect,~~ there ~~may~~ can be ~~some~~ no question as to whether Section 9-220 is directly applicable to the instant proposal, ~~although~~ as AG, CUB and CCSAO claim it is. ~~What is clear is that t~~The section speaks directly to "changes in the cost of purchased power", and where applicable, it requires annual hearings to consider the prudency of power purchases being passed through to ratepayers via FAC riders. In the instant case, it is undisputed that the supply acquisitions in question are in fact "purchased power."
>
> Although Ameren currently has no fuel adjustment clause in effect~~! All things considered~~, the Commission believes that ~~while~~ the Commission is not precluded from authorizing pass-through of procurement costs without formal reinstatement of a FAC and Section 9-220 provides . . .

(*See* PO at 78.)[2]

2. The Commission should reject Ameren's request to eliminate the Section of the Proposed Order relating to State and Federal Authority and Federal Pre-emption

Ameren seeks to strike the entire section entitled "State and Federal Authority; Federal Pre-emption" from the Proposed Order. No citations to legal authority or even any arguments are offered in support of this sweeping demand. For that reason alone, the Commission should reject Ameren's request to strike this section – which, as explained below, is an essential part of the Proposed Order.

[2] The People propose moving the fuel adjustment clause language to the next paragraph because it does not fit well in the revised sentence relating to Article IX.

The Commission has exclusive jurisdiction over the *retail* rates Ameren charges consumers. *Pike County Light and Power Co. v. Pennsylvania Public Utility Commission,* 465 A.2d 735, 738 (PA 1983). Federal Energy Regulatory Commission (FERC) jurisdiction extends "only to those matters that are not subject to regulation by the States." Id. FERC's wholesale ratemaking authority and the state's retail ratemaking authority:

> . . . do not overlap, and there is nothing in the federal legislation which preempts [a state commission's] authority to determine the reasonableness of a utility company's claimed expenses. In fact . . . the Federal Power Act . . . expressly preserve[s] that important state authority.

Pike County, 465 A2d at 738.

The ICC's authority to review costs incurred by electric utilities, to determine whether they are just, reasonable and prudently incurred, extends to review of the cost of electricity procured under wholesale rates established by FERC. *Id.* According to the Illinois Supreme Court: "States retain the authority to review the prudence of a distributor's actions in incurring FERC-approved supply charges when the distributor had a choice whether to incur the charge." *General Motors Corporation v. Illinos Com.Comm'n*, 143 Ill 2d 407, 421-22; 574 NE2d 650, 658 (1991) (summarizing the holding of *Pike County* as construed by the U.S. Supreme Court in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore* (1988), 487 U.S. 354, 108 S.Ct. 2428, 1010 L.Ed.2d 322 and *Nantahala Power & Light Co. v. Thornburg* (1986), 476 U.S. 953, 106 S.Ct. 2349, 90 L.E.2d 943.)

The Illinois Supreme Court explains that the U.S. Supreme Court's discussion of *Pike County* makes clear that:

> . . . A State regulatory agency could find that purchase of a particular quantity of power from a particular source was unreasonable if lower cost power was available elsewhere, even if the cost of the purchased power had been approved by FERC, and therefore deemed reasonable. *Mississippi Power,* 487 U.S. at 373, 108 S.Ct. at 2440, 101 L.Ed.2d at 340; *Nantahala,* 476 U.S. at 972, 106 S.Ct. at 2360, 90 L.Ed.2d at 958.

General Motors Corporation v. Illinois Com.Comm'n, 143 Ill 2d at 422; 574 NE2d at 658.

Nonetheless, throughout this proceeding, Ameren has argued that the ICC is somehow pre-empted by federal law from reviewing costs incurred in connection with wholesale power purchases. The Proposed Order finds that this is not the case:

> . . . the Commission declines at this time to find that it is pre-empted by federal law from conducting a post-transaction review of the prudence of Ameren's actions in incurring the FERC-approved supply charges in question. . . . states are not pre-empted from reviewing a utility's pass-through of such charges to retail customers in some situations, such as where the utility had a choice whether to incur the charge or where lower-priced power was available to it.

(PO at 80.) Ameren's request to delete the section of the Proposed Order in which these findings appear is unsupported and unsupportable. The Commission should reject Ameren's request to delete Section III.E.4 (State and Federal Authority; Federal Pre-emption) from the Proposed Order.

C. The Commission Should Reject Ameren's attempt to add language to the Proposed Order relating to Generation Transfers. (Exception No. 10)

Ameren seeks to strike language in the Proposed Order stating that the Commission "declines to find that Ameren failed to act prudently when it

transferred its generation plants . . .” (PO at 75.) Ameren proposes to replace this language with new findings relating to the Commission’s “authority to review the prudence of the plant transfers” and the reasonableness of Ameren’s decisions to divest generation. (Ameren BOE at 27.) All of these findings are beyond the scope of this consolidated proceeding. The Commission should, therefore, reject the substitute language offered by Ameren and consider striking the entire “Transfer of Generation Plants” section from the Proposed Order. (PO at 75.)

The Proposed Order makes clear that the prudence of Ameren’s divestiture of generation assets is not an issue that was directly raised in this proceeding:

> In this proceeding AG and CUB have asserted that Ameren’s need to obtain generation is the result of its choice to transfer and sell its generation assets pursuant to Section 16-111(g) of the Act. *The implication* is that Ameren should have taken additional steps to ensure that it was able to meet its obligations to residential and small commercial customers post-2006 before completing these transactions. These parties *appear to be suggesting* that Ameren failed to act prudently on behalf of residential customers.

(PO at 75, emphasis added.)

To the extent generation transfer was raised in this proceeding, it was primarily in the context of benchmarking – to shed some light on a series of Reaganesque questions: If Ameren’s auction proposal were adopted, would customers be better off than before divestiture? Better off than they are today? Better off than customers in deregulated states? Better off than customers in regulated states? (See, *e.g.,* AG Ex. 1.0 at 17 - 27 and AG Ex 5.0 at 10.)

The “Issues Outline” negotiated by the parties to this consolidated proceeding, prior to submitting briefs, did not frame the divestiture issue as a question of Ameren’s prudence. (Issues Outline, filed on e-docket on October 11,

2005, in docket nos. 05-0160/61/62.) Rather, Item III.B of the Issues Outline makes reference to "the history of sale and divestiture of former utility generation assets." *Id.* As noted above, CUB and the AG did touch on this history during the proceeding – but they did not attempt to make a case regarding the prudence of the transfers, or lack thereof.

Since the prudence issue was raised only by "implication" and through arguments that "appear to suggest" that Ameren failed to act prudently, it would be highly inappropriate to revise the Proposed Order to include the expansive language that Ameren advocates. (Ameren BOE at 27.) Moreover, in light of the above discussion, it may not be appropriate to retain the existing language in the Proposed Order relating to the transfer of Ameren's generation plants. (PO at 75.) The Commission should carefully consider whether the entire "Transfer of Generation Plants" section of the Proposed Order should be deleted because it is beyond the scope of this consolidated proceeding.

III. REPLY TO ICC STAFF

Staff, while accepting the annual prudence reviews and reconciliation proceedings recommended in the Proposed Order, would have the Commission find that PUA Section 9-220 does not govern the purchased power rider Ameren proposes in this docket. The Commission should reject Staff's position on this issue and reject Staff's proposed language. Ameren's request that purchased power rates be collected in a rider falls squarely within Section 9-220. The Commission should also reject Staff's suggested revisions to the Proposed Order to allow contingency purchases to be presumed prudent.

A. The Commission Should Reject Staff's Suggestion That The Purchased Power Rate Ameren Has Requested In This Docket Be Treated As A Section 9-201, Rather Than A Section 9-220 Rate And Amend The Proposed Order To Specifically Treat It As A Section 9-220 Purchased Power Adjustment.

Staff notes that the Proposed Order adopted a prudence review that was not advocated by any party. Staff Exc. at 2. This point, while not particularly significant, ignores the fact that the AG, CUB and other consumer representatives, have insisted throughout this proceeding that it is unlawful and contrary to the public interest to pre-approve rates derived from a new, untested procurement method and that a prudence review of Ameren's rates is necessary. See, e.g., CUB Ex. 4.0 at 8. The Public Utilities Act contains specific procedures for addressing variable purchased power rates, and the Proposed Order properly incorporates those statutory procedures into Ameren's proposal. Without waiving objections and opposition to the proposed auction, the AG requests that the Commission reject Staff's suggestion that the Commission authorize auction rates under its general, section 9-201 ratemaking authority, instead of Section 9-220.

PUA Section 9-220 was the General Assembly's response to City of Chicago v. Illinois Commerce Commission , 13 Ill. 2d 607 (1958), where the Court allowed a rider for purchased gas costs under Section 9-201. In Section 9-220 the General Assembly specifies procedures for reviewing the cost of gas, fuel costs, purchased power and other items that the utility purchases as components of utility service. Those procedures include annual reviews (1) to reconcile the

amount collected from consumers with the costs incurred by the utility, and (2) to review the prudence of the costs passed on to consumers. (220 ILCS 5/9-220)[3].

By enacting Section 9-220 in response to City of Chicago, the General Assembly directed that purchased power, and other specified expenses, could be recovered either in base rates or separately in a rider, provided that an annual prudence review and reconciliation occurs. 220 ILSC 5/9-220(a). It is an elementary principle of statutory construction that when a statute provides specific direction on how an expense should be treated, the Commission must follow the statute, as the specific always supersedes the general. County of Winnebago v. Davis, 156 Ill.App.3rd 535, 539 (2nd Dist. 1987).

Staff suggests that the Commission should not treat the rate produced by Ameren's proposal as a UFAC, governed by Section 9-220, because Ameren did not file its request under Section 9-220. Staff Exc. at 6. Irrespective of whether Ameren specifically fashioned its request under Section 9-220, it generally filed its tariffs under Article IX.[4] The Proposed Order accurately evaluated the Ameren

[3] Section 9-220 of the Public Utilities Act requires the Commission to initiate annual public hearings:

> to determine whether the clauses reflect actual costs of fuel, gas, power, or coal transportation purchased to determine whether such purchases were prudent, and to reconcile any amounts collected with the actual costs of fuel, power, gas, or coal transportation prudently purchased. In each such proceeding, the burden of proof shall be upon the utility to establish the prudence of its costs of fuel, power, gas, or coal transportation purchases and costs.

5 ILCS 9-220(a). The Commission has also developed rules to further clarify utilities' obligations and the Commission's authority to review natural gas or fuel costs. *83 Ill. Adm. Code Part 525 (purchased gas); 83 Ill. Adm. Code Part 425 (electric fuel adjustment).*

[4] A "Supplemental Statement" filed in connection with Ameren's proposed tariffs states that they were "filed pursuant to Article IX, just as envisioned by the statute." *Supplemental Statement, ICC docket nos. 05-0160, 05-0161, 05-0162 (February 28, 2005) p. 6.*

rate proposals as, in fact and effect, a Section 9-220 rider, and properly imposed the annual reviews specified by the statute. The Commission Order should specify that the Ameren request to recover purchased power costs in a variable rider is, in substance, a UFAC and will be treated as such under Section 9-220.[5]

Staff argues that Section 9-220 does not apply because Section 9-220 states that the Commission may authorize a purchased power rider. (Staff BOE at 6.) Staff asserts that the General Assembly created an option, rather than an obligation to approve a purchased power rider. *Id.* That's simply wrong.

While Section 9-220 does not require that the Commission approve purchased power or fuel riders, it clearly authorizes the Commission to exercise its discretion to reject a purchased power rider if it believes that it is not justified by the circumstances. The permissive nature of Section 9-220 demonstrates that the Commission is not obligated to accept the purchased power rider proposed by Ameren, particularly when, as the AG has demonstrated, the Ameren plan is not designed to obtain least cost service for consumers.

The permissive terms of Section 9-220 do not authorize the Commission to disregard Section 9-220 in connection with purchased power riders and avoid its mandated procedures by simply proposing a purchased power rider that does not comply with Section 9-220. The Commission can refuse to approve a rider for failing to comply with Section 9-220, but it cannot simply ignore an obviously applicable statute in order to avoid consumer protections. The Commission should

[5] Section 9-220 provides that a UFAC cannot be reinstated by an electric utility "during the 5 years following the date of the Commission's Order [eliminating the UFAC], but in any event no earlier than January 1, 2007." 220 ILCS 5/9-220(b). The reinstatement authorized in this docket would occur no earlier than January 1, 2007.

reject Staff's suggestion that the Commission disregard Section 9-220 and treat the Ameren proposal as if it were a Section 9-201 filing.

The importance of treating Ameren's rate proposal as a purchased power rider is clear from the way Ameren has sought to avoid annual prudence reviews and reconciliation. Section 9-220 requires an annual, after-the-fact prudence review -- which Ameren has expressly sought to avoid. See Ameren BOE at 19-22. Section 9-220 also provides for an annual, docketed reconciliation of revenues and costs. Ameren may try to avoid the conditions found in Section 9-220 by calling its purchased power rider something else, but the Commission must enforce the law as written, and Section 9-220 governs purchased power riders irrespective of how Staff or Ameren characterize the rate.

Staff argues that Ameren's proposal is "undeniably different and distinguishable" from a Section 9-220 rider, and that therefore it should not be treated as a Section 9-220 rider. Staff BOE at 6. The Commission should reject this argument as an invitation to utilities to violate statutory consumer protections by simply ignoring the relevant and controlling statutory provisions and requesting inconsistent regulatory treatment. Although Staff does not oppose a prudence review and reconciliation, by suggesting that the Commission treat Ameren's rate proposal as a Section 9-201 rate, it could negate Ameren's statutory duties under Section 9-220 and weaken the Commission's right to impose a prudence review and reconciliation. Staff's suggestion ignores the substance of Ameren's proposal and misapplies the Public Utilities Act by failing to apply Section 9-220 to a proposal for rider recovery of purchased power costs.

The Commission should reject Staff's exceptions and proposed language. The Proposed Order can be clarified to state that the Commission will apply Section 9-220 to Ameren's purchased power rate, notwithstanding Ameren's failure to formally identify it as a UFAC under that Section. The following paragraph, found on page 77[6], should be amended as follows (in the event that the Commission allows the auction process and the monthly purchased power rate):

> All things considered, the Commission believes that while the Commission is not precluded from authorizing a pass-through of procurement costs without formal reinstatement of a FAC, Ameren's proposal in this docket effectively adopts a purchased power adjustment rate, and Section 9-220 provides specific ~~appropriate guidance with respect to the~~ procedures that ~~should~~ are to be followed for reviewing the pass-through of purchased power costs, including purchases made pursuant to the auction. While the instant proceeding and the Commission review during the three-day post-auction window are important tools in terms of prudency, they do not constitute annual public hearings within the meaning of 9-220. Furthermore, while the purported lack of "discretionary conduct" by Ameren in making the auction-driven purchases may be relevant in the evaluation of the auction proposal and in the review of auction purchases, there is no language in Section 9-220 exempting "no discretion" purchases from the annual reconciliation process.

B. The Commission should reject Staffs attempt to create a Presumption of Prudence for Contingency Purchases.

The Staff does not oppose the Proposed Order's decision to conduct annual prudence reviews that include contingency purchases. (Staff Exc. at 15.) However, Staff erroneously argues that contingency purchases should be accorded a presumption of prudence, similar to the presumption that the Proposed Order recommends for auction results. Id. Although the AG does not agree that the Commission should approve the auction, or that a presumption of prudence is

[6] Changes to page 75 of the Proposed Order to clarify that Ameren filed its tariffs under Article IX.

appropriate, even if the Commission allows a presumption of prudence for auction purchases, contingency purchases should not be accorded the same presumption.

Contingency purchases are purchases made outside the auction. Under Ameren's plan, various circumstances can give rise to the need to purchase supply outside the auction -- including supplier default, insufficient supplier participation, or Commission rejection of results. (See Proposed Order at 128-130.) Ameren wants approval to take certain steps in response to these contingencies, but contingent purchases will of necessity require the company to exercise sound judgment on behalf of consumers. Although Ameren's contingency purchases plan would have it purchase additional or replacement supply from MISO administered markets, Ameren's contingency purchasing decisions should be flexible and take full advantage of the opportunities presented in the wholesale market. Consumers are entitled to regulatory review of those purchases both to give Ameren an incentive to minimize its costs and to protect consumers from unanticipated events or actions.

The additional language proposed by Staff at pages 16 of its Exceptions should be rejected, and the following changes should be made to pages 55, 128, 129 and 144.

Page 80, Prudency Reviews of Contingency Purchases, should be amended as follows:

5. Prudency Review of Contingency Purchases

As discussed elsewhere, Ameren may make “contingency” purchases as a result of a supplier’s default or other scenarios. Generally speaking, Ameren and Staff agree that no post-auction prudency review is

necessary in situations that Ameren and Staff believe will not involve "discretionary action" by Ameren.

The AG disagrees, arguing, among things, that the situations in question, such as purchases from MISO-administered markets, are not free of judgment and discretion by Ameren. AG also contends that an annual review of contingency purchases is required by Section 9-220 of the Act.

As indicated above, Section 9-220, where applicable, requires annual hearings to consider the prudency of power purchases if those costs are being passed through to ratepayers via FAC riders. In the instant case, it is undisputed that the contingency acquisitions in question are "purchased power." The Commission believes Section 9-220 provides ~~appropriate guidance with respect to~~ the procedures that should be followed for reviewing the pass-through of contingency power purchases. In the Commission's opinion, if Ameren wants authorization in this docket to pass through, to ratepayers, the costs of contingency purchases, such purchases should be subject to annual prudency reviews as part of the annual reconciliation proceeding. <u>These purchases, if necessary, would be made outside the auction, and therefore are not entitled to the presumption of prudence applicable to auction purchases.</u>

The language on page 130 should also be amended so that it is clear that electricity obtained under the contingencies are to be evaluated on their merits, and not be included in the presumption.

On page 130, section 4. Commission Conclusions, should be amended as follows:

[J.]4. Commission Conclusion

Based on a review of the record, the contingency plans that were actually offered into evidence are the ones proposed by Ameren, as clarified by Staff. These proposals appear to be reasonable methods for acquiring supply under the three contingency scenarios described.

Parties' positions on the disputed issue of post-transaction prudency reviews of contingency purchases are addressed elsewhere in this order. <u>However, the Commission directs Ameren to use its best efforts to obtain low cost electricity for consumers in the event of volume reductions or other contingencies, and the Commission will review the rates for electricity purchased outside the auction in the annual review under Section 9-220. No presumption of prudence will apply to these purchases.</u>

IV. CONCLUSION

WHEREFORE, the People of the State of Illinois respectfully request that the Commission accept the arguments set forth herein opposing various exceptions proposed by Ameren and Staff, and instead adopt the exceptions to the Proposed Order filed with this Reply and in the People's Exceptions and Brief on Exceptions.

Respectfully submitted,

The People of the State of Illinois
by LISA MADIGAN, Attorney General

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Susan Hedman
Susan L. Satter
Public Utilities Bureau
Office of the Attorney General
100 West Randolph Street, 11th Floor
Chicago, Illinois 60601
Telephone: (312) 814-3736
Fax: (312) 814-3212
E-Mail: shedman@atg.state.il.us
E-Mail: ssatter@atg.state.il.us

December 30, 2005